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No. 82-188

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF OKLAHOMA,
Petitioner,

vs.

CECIL DEJUAN HARRIS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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November, 1982

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STATEMENT OF THE CASE

The Respondent, Cecil Dejuan Harris, was convicted at his jury trial in the District Court of Cleveland County, Oklahoma of First Degree Rape. His punishment was assessed at five (5) years imprisonment.

From said judgment and sentence the Respondent perfected his appeal to the Oklahoma Court of Criminal Appeals, Case No. F-80-305. The Oklahoma Court of Criminal Appeals reversed Respondent's conviction. A petition for rehearing filed by the Petitioner (State of Oklahoma) was denied, therefore rendering the State Court's determination final. *Harris* v. *State*, 645 P.2d 1036 (Okl.Cr. 1982).

STATEMENT OF THE FACTS

At trial the State attempted to prove its case mainly by the uncorroborated testimony of prosecutrix, a thirteen-year-old stepdaughter of Respondent. She testified that she was awakened by the Respondent one morning during the first week of April, 1979. She followed Respondent to his bedroom where he and the stepdaughter engaged in sexual intercourse. In addition to presenting witnesses establishing his good character, the Respondent presented testimony and documentary evidence that he was out of town when this occurrence was supposed to have happened. The prosecutor, rejecting the trial court's offer to allow him a postponement, commenced to vigorously cross-examine the Respondent and his witnesses on pre-trial silence. As observed by the Oklahoma Court of Criminal Appeals, in their decision, "the prosecutor continued this approach throughout the cross-examination and during closing argument."

ARGUMENT AND AUTHORITIES

The Petitioner contends that under Rule 17 of this Court, certiorari should be granted and the matter remanded as in *Lane* v. *Smith*, ___ U.S. ___, 102 S.Ct. 2898, 73 L.Ed.2d 1310 (1982), previously *United States ex rel. Smith* v. *Franzen*, 660 F.2d 237 (7th Cir. 1981).

The proposition is apparently premised on Rule 17, part c, that the decision of the Oklahoma Court of Criminal Appeals has decided a federal question in a way which may conflict with *Fletcher* v. *Weir*, ___ U.S. ___, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982).

The Respondent submits that the decision of the Oklahoma Court of Criminal Appeals is neither in conflict with, nor adverse to, *Fletcher* v. *Weir*, supra. The rule of *Fletcher* is not applicable to Respondent's case and may be distinguished.

The record and transcripts of the Respondent's trial reveal that he was advised of his rights and this fact was made known to the jury. The prosecution witnesses, Bussey and Detective Bowerman, showed that the Respondent was taken to court-related services where the accused is allowed to have his lawyer present and is advised of his rights (Trial Transcript, p.21). Detective Bowerman testified that the Respondent was her suspect, that she was responsible for him being placed in jail and that she attempted to speak with him while he was incarcerated. He refused (Trial Transcript, pp.29, 30). As early as preliminary hearing, Bowerman was testifying that Respondent refused to discuss the case with her (Preliminary Hearing Transcript, p.11).

While the record does not reflect the perfect textbook recitation of the *Miranda*[1] *warnings*, the showing made, sufficiently triggered application of *Doyle* v. *Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), barring cross-examination by the prosecutor concerning Respondent's pretrial silence to discredit his alibi defense in front of the jury. Because there is some showing that Respondent was advised under *Miranda*, the Oklahoma Court of Crim-

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[1] *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

inal Appeals decision is consistent with the enunciation of limitation set forth in *Fletcher*.

Further, under the facts and circumstances of *Harris*, the Oklahoma Court of Criminal Appeals stated:

> "Here, production of the appellant's alibi evidence not only required him to identify and to authenticate the documents, but to inform state officials of the connection between the documents and his assertion that he was out of town on the days in question. *The documentary evidence was apparently insufficient to establish that fact without some testimony by the appellant. Accordingly, we hold that under the instant circumstances,* the prosecutor's inquiry as to the reasons for the appellant's pretrial silence was improper." *Id.* at 1038 (Emphasis added)[2]

The Respondent submits that *Harris* is, by its very wording, limited to the circumstances thereof and does not create any conflict with the decisions of this Court, and particularly not with *Fletcher* v. *Weir*, supra.

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[2] The date of the offense was never actually settled until preliminary hearing, and even then some question existed as to the exact date. Discussion thereon was still occurring on the date of trial (Trial Transcript, pp.7,8).

CONCLUSION

THEREFORE, premises considered, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent

November, 1982

CERTIFICATE OF SERVICE

I, J. Malone Brewer, am the Attorney of Record for the Respondent, Cecil Dejuan Harris, and that on November _____, 1982, I served three copies of the foregoing Brief in Opposition, by placing same in a duly addressed envelope with First Class postage fully prepaid, in the United States Mail, to the following named counsel of record shown below:

Jan Eric Cartwright
Attorney General of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105

All parties required to be served have been served.

_____

J. Malone Brewer